

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DARCY G. CLARK,

Plaintiff,

v.

CAROLYN W. COLVIN, Commissioner of
Social Security,

Defendant.

Case No. C13-747-JCC-BAT

**REPORT AND
RECOMMENDATION**

Darcy G. Clark seeks review of the denial of his Supplemental Security Income and Disability Insurance Benefits applications. He contends the ALJ erred by (1) discounting his credibility, (2) failing to account for all of his limitations when assessing his residual functional capacity (“RFC”); and (3) failing to hold a supplemental hearing after taking post-hearing evidence. Dkt. 16 at 2. As discussed below, the Court recommends the case be **REVERSED** and **REMANDED** for further administrative proceedings.

BACKGROUND

Mr. Clark is currently 49 years old, has a GED, and has worked as a manufacturing assembler, janitor, machine operator, newsprint handler, landscape helper, general laborer, and

1 sawyer.¹ On December 22, 2010, he applied for benefits, alleging disability as of February 20,
 2 2010. Tr. 221-31. His applications were denied initially and on reconsideration. Tr. 136-39,
 3 143-56. The ALJ conducted a hearing on March 6, 2012 (Tr. 36-83), and subsequently found
 4 Mr. Clark not disabled. Tr. 17-30. As the Appeals Council denied Mr. Clark's request for
 5 review, the ALJ's decision is the Commissioner's final decision. Tr. 1-4.

6 THE ALJ'S DECISION

7 Utilizing the five-step disability evaluation process,² the ALJ found:

8 **Step one:** Mr. Clark had not engaged in substantial gainful activity since February 20,
 9 2010.

10 **Step two:** Mr. Clark's back disorder, arthritis/arthropathies, obesity, diabetes, vision
 11 problems, sleep apnea, depression, and anxiety are severe impairments.

12 **Step three:** These impairments did not meet or equal the requirements of a listed
 13 impairment.³

14 **RFC:** Mr. Clark can perform a full range of medium work with the following
 15 limitations: he can perform only frequent handling and fingering; occasional stooping,
 16 crouching, kneeling, balancing, crawling, and climbing stairs/ramps; no climbing ladders;
 17 occasional interaction with the general public, but frequent interaction with coworkers or
 18 supervisors. He can remember, understand, and carry out simple and detailed
 19 instructions or tasks generally required by occupations with an SVP of 1 to 4. However,
 20 his jobs tasks cannot require more than occasional depth perception.

21 **Steps four and five:** Mr. Clark could perform his past work as a store's laborer. This
 22 work does not require the performance of work-related activities precluded by his
 23 residual functional capacity. In the alternative, even if he was unable to perform his past
 relevant work, he could perform the requirements of production line solder, table worker,
 housekeeper, and diet clerk.

Tr. 17-30.

DISCUSSION

A. The ALJ Did Not Err in Discounting Mr. Clark's Credibility

¹ Tr. 41, 248, 254.

² 20 C.F.R. §§ 404.1520, 416.920.

³ 20 C.F.R. Part 404, Subpart P, Appendix 1.

1 The ALJ provided a number of reasons to discount Mr. Clark's credibility, specifically
2 (1) the fact that his most recent job ended in February 2010 because of the employer's lack of
3 business, rather than disability, suggesting that he could have continued to work at medium
4 exertion levels after February 2010; (2) generally normal objective findings in the medical
5 evidence, which is inconsistent with his allegations; (3) inconsistent daily activities; and (4)
6 some symptoms improved with treatment. Tr. 24-26. Mr. Clark does not directly dispute the
7 validity of the second reason, but argues that because the other three reasons are not supported
8 by the record, the second reason cannot alone support the ALJ's adverse credibility
9 determination. Dkt. 16 at 7; Dkt. 20 at 6.

10 **1. Mr. Clark's Work History**

11 In reference to the ALJ's first reason — Mr. Clark's ability to work at a medium exertion
12 level in his previous job until February 2010 — Mr. Clark cites evidence that he contends shows
13 that his medical conditions worsened after his last job ended, and thus the ALJ erred in inferring
14 that because he had previously worked at the medium level he could have continued to do so.
15 Dkt. 20 at 2-4. Specifically, Mr. Clark points to evidence that he gained a significant amount of
16 weight between 2008 and 2010, and that he complained of double vision and left knee pain and
17 was diagnosed with diabetes in January 2011. Dkt. 16 at 6-7. The Commissioner counters that
18 (1) Mr. Clark's weight gain is not specifically tied to the period after he stopped working, and
19 thus could have occurred beforehand; (2) Mr. Clark's subjective complaints regarding vision and
20 knee pain are not sufficient to establish that he became more impaired, especially because the
21 objective medical evidence does not corroborate his complaints; and (3) a diagnosis of diabetes
22 does not establish that Mr. Clark actually became more impaired at the time of diagnosis. Dkt.
23 19 at 6-7. The Commissioner also notes that Ninth Circuit authority indicates that it is

1 “reasonable to disregard allegations of disabling impairments where, as here, a claimant stopped
2 work for reasons other than his impairments.” Dkt. 19 at 6 (citing *Bruton v. Massanari*, 268 F.3d
3 824, 828 (9th Cir. 2001)).

4 *Bruton* does indicate that the context of a claimant’s work history is relevant, such that if
5 his or her last job ended for reasons not related to his or her impairments, this circumstance
6 undermines the credibility of the claimant’s subjective complaints. 268 F.3d at 828. In that case,
7 the claimant’s alleged onset date was the same date that he was laid off for economic reasons,
8 not impairment-related reasons. 268 F.3d at 826. Other cases have distinguished *Bruton* in
9 situations where the claimant’s alleged onset date is more than a year after the claimant last
10 worked and, in some cases, where the evidence shows that the claimant’s condition worsened in
11 the intervening time. *See, e.g., McGowan v. Astrue*, 2012 WL 5390337, at *5 (W.D. Wash. Oct.
12 17, 2012); *Smith v. Astrue*, 2012 WL 5269395, at *9 (D. Ariz. Oct. 24, 2012); *Shehan v. Astrue*,
13 2009 WL 2524573, at *3 (C.D. Cal. Aug. 17, 2009).

14 In this case, Mr. Clark’s date of alleged onset of disability is the same day he was laid off
15 from his most recent job for economic reasons. *See* Tr. 49-50, 221, 247. Though Mr. Clark has
16 pointed to some equivocal evidence that could suggest that his conditions worsened at some
17 point after he was laid off, none of the evidence cited by Mr. Clark necessarily establishes that
18 his functionality decreased. Given the timing of Mr. Clark’s benefits application, the Court
19 cannot find that the ALJ was unreasonable in inferring that because Mr. Clark worked up until
20 the time of his disability application, and because that job ended for economic reasons instead of
21 impairment-related reasons, his subjective complaints were less credible.

22 **2. Mr. Clark’s Activities**

23 The ALJ cited Mr. Clark’s ability to shop, clean, manage his personal hygiene, attend

1 community college classes (studying business computers, bookkeeping, accounting, and data
2 entry) as undermining his allegations. Tr. 25. The ALJ specifically noted that although Mr.
3 Clark claimed to have problems typing due to arthritis and problems looking at a computer
4 screen due to vision problems, he was nonetheless able to complete a course in business
5 computing and receive a certificate. *Id.*

6 Mr. Clark contends that the ALJ erred in construing his coursework as inconsistent with
7 his allegations regarding limitations in typing and viewing a computer screen, because it is
8 unclear how much he actually used the computer. Dkt. 20 at 5. Given that Mr. Clark was
9 studying business computers, bookkeeping, accounting, and data entry, it was reasonable for the
10 ALJ to infer that Mr. Clark's alleged difficulties in keyboarding and viewing a computer screen
11 were not as restricting as alleged.

12 **3. Improvement/Lack of Symptomology Regarding Sleep Apnea and Diabetes**

13 The ALJ cited evidence showing that Mr. Clark's sleep apnea improved with treatment,
14 and that his diabetes did not cause vision-related problems, and inferred that his symptoms were
15 not as severe as alleged. Tr. 26. The ALJ reasonably construed this evidence to demonstrate
16 improvement or effective control of symptoms, which undermines his testimony regarding the
17 severity of his symptoms. *See, e.g., Warre v. Comm'r of Social Sec. Admin.*, 439 F.3d 1001,
18 1006 (9th Cir. 2006).

19 Thus, because the ALJ provided a number of clear and convincing reasons to discount
20 Mr. Clark's credibility, his adverse credibility determination should be affirmed.

21 **B. The ALJ Erred in Assessing Mr. Clark's RFC**

22 Mr. Clark argues that the ALJ erred in discounting the opinions of consultative examiners
23 Jordan Firestone, M.D., and Gerald Cavanee, Ph.D, thereby failing to account for all of his

1 limitations in the RFC assessment. Tr. 26-27 (citing Tr. 480-84, 531-44).

2 **1. Dr. Firestone**

3 The ALJ provided a number of reasons to discount Dr. Firestone's opinion, specifically
4 the inconsistency between the medical evidence and Dr. Firestone's opinions regarding Mr.
5 Clark's exertional capabilities and vibration/temperature restrictions, and the lack of support and
6 expertise regarding the impact of Mr. Clark's mental limitations. Tr. 26. Mr. Clark challenges
7 the ALJ's first basis on two grounds: (1) the ALJ did not explicitly specify what evidence is
8 inconsistent with Dr. Firestone's opinions regarding exertional level and vibration/temperature
9 restrictions, and (2) the ALJ did not explicitly address Dr. Firestone's restrictions regarding
10 standing and a need to change positions, and thus should have included them in the RFC. Dkt.
11 20 at 7-9.

12 To Mr. Clark's first point, the Commissioner directs the Court's attention to the portion
13 of the ALJ's decision where he summarized Dr. Firestone's findings. *See* Tr. 25. According to
14 the Commissioner, these findings provide a specific and legitimate reason to discount Dr.
15 Firestone's opinion: Mr. Clark's gait is stable (although slightly wide-based), he can rise on his
16 toes and heels, he has normal joint range of motion, and intact strength, muscle bulk, tone, and
17 sensation in all extremities. These findings could be relevant to Mr. Clark's ability to lift/carry,
18 but it is not clear how they undermine the vibration or temperature restrictions, nor do they have
19 any apparent bearing on Mr. Clark's ability to stand or his need to change positions hourly.
20 Thus, the ALJ's summary of Dr. Firestone's findings does not adequately specify why most of
21 Dr. Firestone's opinions are rejected. On remand, the ALJ shall address explicitly address those
22 restrictions and either account for Dr. Firestone's opinions as to those restrictions in the RFC
23 assessment or provide specific and legitimate reasons to reject them.

1 **2. Dr. Cavanee**

2 The ALJ assigned some weight to Dr. Cavanee's January 2012 opinion, but rejected his
3 opinion that Mr. Clark's impairments combine to render him unable to work, citing normal
4 mental status exam ("MSE") findings. Tr. 26-27. Although Mr. Clark points to other, uncited
5 portions of the MSE findings that are abnormal (Dkt. 20 at 9-10), he has not established that the
6 ALJ was unreasonable in construing Mr. Clark's 29/30 MSE score as inconsistent with Dr.
7 Cavanee's overall opinion. *See* Tr. 535-56.

8 **C. Any Error at Steps Four and Five may be Cured on Remand**

9 Mr. Clark argues that the ALJ erred in finding that he could perform the jobs of store's
10 laborer and production line solderer, because both of those jobs require frequent depth
11 perception, and the ALJ limited him to only occasional depth perception. Dkt. 16 at 17-18. The
12 Commissioner does not dispute that the ALJ's RFC assessment would preclude performance of
13 those jobs, but argues that the ALJ's finding that Mr. Clark could also perform the jobs of
14 housekeeper and diet clerk cured the error. Dkt. 19 at 14-15.

15 At this point, the Court cannot evaluate whether the Commissioner's argument would
16 prevail, because the ALJ will be reassessing Mr. Clark's RFC on remand and it cannot be
17 determined whether that reformulated RFC would be consistent with the requirements of
18 housekeeper or diet clerk. Accordingly, the Court defers ruling as to whether the step-four error
19 is cured at step five.

20 **D. Mr. Clark's Post-Hearing Request was Untimely**

21 After the administrative hearing, the ALJ determined that he needed more medical
22 information about Mr. Clark's visual capabilities, and ordered him to attend a consultative
23 examination with an ophthalmologist, Richard E. Bensinger, M.D. Tr. 299. Mr. Clark did so,

1 and Dr. Bensinger reported on various aspects of Mr. Clark's eyesight, and found him to have no
2 changes caused by diabetes. Tr. 618-20. The ALJ sent Dr. Bensinger's report to Mr. Clark's
3 counsel, with a letter offering the opportunity to submit written interrogatories to Dr. Bensinger
4 and/or to request a supplemental hearing. Tr. 212. The ALJ's letter indicated that either request
5 must be received within ten days of Mr. Clark's receipt of the letter, and that the ALJ retains
6 discretion to deny the requests if he determines that granting them would be unnecessary. Tr.
7 212-13. Mr. Clark did not submit his requests until the eleventh day after receipt (Tr. 215-17),
8 and the ALJ entered his decision without apparently considering Mr. Clark's supplemental
9 materials or requests.

10 Mr. Clark argues that his request was not untimely, because it was submitted within the
11 15-day window allowed by Social Security regulations. Dkt. 20 at 10. Mr. Clark cites no
12 specific authority⁴ applying a 15-day rule to all responses submitted to the Commissioner, nor
13 does the Administration's internal procedures manual suggest that such a window applies to
14 responses to post-hearing proffers. *See* Hearings, Appeals and Litigation Law Manual
15 ("HALLEX") I-2-7-30, *available at* http://www.ssa.gov/OP_Home/hallex/I-02/I-2-7-30.html
16 (last accessed October 1, 2013). In fact, HALLEX does not even mandate that any particular
17 response period be provided; it simply indicates that the proffer letter must give the claimant "a
18 time limit" to respond. HALLEX I-2-7-30(B).

19 The wording of the ALJ's letter clearly indicates that a response was due within ten days
20 of Mr. Clark's counsel's receipt of the proffer letter, which was admittedly eleven days before

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22 ⁴ It may be Mr. Clark had in mind 20 C.F.R. § 422.210(c), which indicates that the 60-day time
23 period in which to file a civil action after receiving the Commissioner's "final decision" starts
running five days after the decision date to allow for mailing time, because receipt is presumed
to occur after five days unless it is shown otherwise. However, this regulation does not indicate
that a five-day grace period is added to any and every Social Security-related deadline.

1 the response was submitted. *Compare* Tr. 212-23 with Tr. 215 (acknowledging that the ALJ's
2 letter was received on a date eleven days earlier). Mr. Clark has failed to show that the ALJ's
3 notice or 10-day time period did not provide a full opportunity to be heard, and thus he has failed
4 to show that the ALJ erred in failing to consider his untimely request.

5 **CONCLUSION**

6 For the foregoing reasons, the Court recommends that the Commissioner's decision be
7 **REVERSED** and the case be **REMANDED** for further administrative proceedings. On remand,
8 the ALJ should reevaluate Dr. Firestone's opinion, specifically his opinions regarding Mr.
9 Clark's ability to stand, his need to change positions, and his limitations regarding temperature
10 and vibration, and reassess Mr. Clark's RFC and the step-four and -five findings in light of that
11 opinion.

12 A proposed order accompanies this Report and Recommendation. Objections, if any, to
13 this Report and Recommendation must be filed no later than **October 16, 2013**. If no objections
14 are filed, the matter should be noted as ready for the Court's consideration on **October 18, 2013**.
15 If objections are filed, any response is due within 14 days after being served with the objections.
16 A party filing an objection must note the matter for the Court's consideration 14 days from the
17 date the objection is filed and served. Objections and responses shall not exceed twelve pages.
18 The failure to timely object may affect the right to appeal.

19 DATED this 2nd day of October, 2013.

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22 BRIAN A. TSUCHIDA
23 United States Magistrate Judge

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